Supreme Court, U.S.
FILED
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No. 95-701

In The

Supreme Court of the United States

October Term, 1995

ALAN WEIL, Executive Director, Colorado Department of Health Care Policy and Financing, in his official capacity,

Petitioner,

vs.

WARREN M. HERN; GRAND JUNCTION WOMEN'S CLINIC; PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS; and MAYFAIR WOMEN'S CENTER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

1. Remarkably, Respondents concede that "this Court has not squarely ruled on the issue presented here," Opp. at 20, and have not attempted to argue – since they cannot – that the issue in this case is not an important one. Thus, they agree with the gravamen of the Petitioner's second argument, that this case is one where "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court . . . . " Rule 10(c), Rules of the Supreme Court of the United States (Oct. 2, 1995).[1]

2. Respondents argue that the decision below is consistent with this Court's decisions in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981) and *South Dakota v. Dole*, 483 U.S. 203, 207 (1987), because they believe that Congress has established an unambiguous requirement that States participating in Medicaid pay for abortions terminating pregnancies resulting from rape or incest. According to Respondents, this unambiguous requirement can be shown in three ways: (1) decisions by lower federal courts, (2) the language and structure of

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[1] At the same time, Respondents continue to assert that the decision below is consistent with *Harris v. McCrae*, 448 U.S. 297 (1980), but this assertion is empty. Opp. at 14. In *Harris*, the Court clearly said that States were not obligated to fund abortions if matching federal funds were not available, but just as clearly, did *not* say that the converse was true – that States must fund abortions if federal matching funds are available. *Id.* at 310 n.14. Thus, Petitioner's position is equally "consistent" with *Harris*, since *Harris* quite simply did not speak to the question presented.

Title XIX itself, and (3) an interpretation by a federal agency. Each of these claims is demonstrably in error.

Initially, Respondents urge that the decision below is in accord with decisions by all other federal appellate courts on this subject over the last fifteen years. In fact, all of these decisions fall into two groups: (1) decisions entered fifteen years ago, before this Court's decisions in *Harris v. McCrae*, *Pennhurst*, and *Dole*; and (2) decisions sparked by the most recent changes to the Hyde Amendment – decisions that are not yet final and that are often marked by vigorous dissents. For example, Judge Nygaard wrote an extensive dissent in *Elizabeth Blackwell Center for Women v. Knoll*, 61 F.3d 170, 185-97 (3d Cir. 1995), and Pennsylvania's petition for rehearing en banc was denied on a vote of 7 to 7 (No. 94-1954 (3d Cir. Aug. 24, 1995)). Judge Bowman dissented in *Little Rock Family Planning Services, P.A. v. Dalton*, 60 F.3d 497 (8th Cir. 1995), writing "Were we writing on a clean slate, I would be inclined to agree with the defendants that states participating in the Medicaid program are not required to fund abortions merely because Congress . . . has chosen to make federal reimbursement available." 60 F.3d at 504. Five of eleven judges voted to grant Nebraska's petition for rehearing en banc in that case (No. 94-3903NEL (8th Cir. Sept. 22, 1995)). Indeed, at least four more petitions for certiorari on similar questions are due to be filed in this Court in the near future: Nebraska (November 13), Pennsylvannia (November 22), Arkansas (December 21), and Louisiana (January 16). Accordingly, it is beyond dispute that at least a dozen circuit court judges and five

States believe this issue warrants review.[2] In light of this, the federal "requirement" at issue simply cannot be characterized as clear and unambiguous.

Respondents further argue that Title XIX plainly requires the States to fund these abortions, but this argument is without merit. According to Respondents, "there is no question that the Medicaid Act – by its terms – requires state Medicaid programs to cover medically necessary services that fall within the mandatory areas of care." Opp. at 18. However, this construction of Title XIX has been expressly rejected by most of the circuits, including the court below. *See* Pet. App. at B-8 ("Participating states are not required . . . to fund all medical services falling under one of the mandatory service categories.") *See also Preterm v. Dukakis*, 591 F.2d 121, 124-25 (1st Cir. 1979), *cert. denied*, 441 U.S. 952 (Title XIX contains "no mandate that all 'medically necessary' services be provided" and federal law does not create "a flat rule that all services within the . . . [mandatory] categories deemed 'medically necessary' by a patient's physician must be provided"); *Zbaraz v. Quern*, 596 F.2d 196, 198 (7th Cir. 1979), *cert. denied*, 448 U.S. 907 (1980) (Title XIX "does not require funding of all medical care which is deemed necessary by the treating physician."); *Roe v. Casey*, 623 F.2d 829, 832-33, n.9 (3d Cir. 1980) ("we would favor the

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[2] In addition, appeals are pending in cases arising out of Michigan (*Engler v. Planned Parenthood Affiliates of Michigan, appeal filed*, Nos. 94-1913 and 94-2097 (6th Cir. 1995)) and North Dakota (*Wessman v. Fargo Women's Health Org., appeal filed*, No. 95-1920NDF (8th Cir. 1995)).

narrower approach taken by the First and Seventh Circuits.") Only the Court of Appeals for the Eighth Circuit has adopted Respondents' position. *Little Rock Family Planning Services, P.A. v. Dalton*, 60 F.3d 497, 499 (8th Cir. 1995). The United States Court of Appeals for the Fifth Circuit demurred. *Hope Medical Group for Women v. Edwards*, 63 F.3d 418, 425 (5th Cir. 1995) ("Some courts have read [Title XIX] as mandating that states must cover all medical procedures certified as 'medically necessary' by a recipient's physician. Other courts have declined to impose such a strict 'medical necessity' restriction on states' discretion.") (citations omitted).[3]

Indeed, Respondents themselves have taken completely inconsistent positions on the scope of this allegedly unambiguous requirement to fund abortions. At trial, Respondents advanced the extreme position that *every* abortion is medically necessary. *See* Tr. at 41-42 (testimony of Respondent Hern); *accord* Hern, *Abortion Practice* 46-47 (1984) ("the distinction between elective and therapeutic abortions is false; all abortions are therapeutic.") Before the Court of Appeals, Respondents argued that "The U.S. Congress, by adding rape and incest to the circumstances in which federal funding is available, indicated that the termination of pregnancies resulting from rape or incest are 'medically necessary.' " Brf. of Plaintiff-Appellees at 25-26.

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[3] Thus, this case also presents the subsidiary question of what is "medically necessary," upon which the Circuits have split. *Cf. Hope Medical Group for Women v. Edwards*, 115 S. Ct. 1, 2 (1994) (Scalia, J., in chambers) (finding no conflict in the Circuits in pre-1994 cases).

Before this Court, Respondents take three different positions. First, they rely upon the "directive,"[4] which says that *all* abortions terminating pregnancies resulting from rape or incest are "medically necessary" ("we believe . . . that abortions of pregnancies resulting from rape and incest are medically necessary in light of both medical and psychological health factors.") Opp. at 15. Next, they argue that the availability of federal funding is the touchstone of what is "medically necessary" ("Congress . . . prohibits federal reimbursement for abortions except in the narrow circumstances that Congress deems to be medically necessary.") Opp. at 12. Finally, Respondents retreat to the position that even though federal funds may be available for abortions terminating pregnancies resulting from rape or incest, only a few are medically necessary and must be funded. Opp. at 16 n.10. Respondents' own confusion in this regard simply underscores how *un*clear the supposed requirement is.

Given the serious split of opinion by the Courts of Appeals – with the majority of circuits rejecting the position advanced by Respondents – one cannot say that the language of Title XIX is clear and unambiguous. Indeed, the various and conflicting rationales used by the courts and Respondents to find this purported requirement serves only to underscore that the requirement is not clear and unambiguous.

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[4] Letter from Sally K. Richardson, Director, Medicaid Bureau, Health Care Financing Administration, United States Dep't of Health and Human Services to State Medicaid Directors (Dec. 28, 1993) (Opp. at 1b-3b).

Respondents further attempt to bolster their argument by soliciting "[j]udicial deference to reasonable interpretations by an agency of a statute that it administers . . . . " Opp. at 16 (quoting *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992)). However, Respondents would ask this Court to ignore the Health Care Financing Administration's ("HCFA") formal rules and *only* defer to the so-called "directive," which is nothing more than a letter expressing a federal official's opinion as to the meaning of the law. Because these "directives" are issued without statutory authority and without following any of the procedural requirements of the Administrative Procedures Act, they "are 'spurious rules,' entitled to no weight whatsoever," *Elizabeth Blackwell Health Center for Women v. Knoll*, 61 F.3d 170, 187 (3d Cir. 1995) (Nygaard, J., dissenting).[5]

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[5] *See also South Carolina v. Katzenbach*, 383 U.S. 301, 359 (1966):

> Certainly if all the provisions of our Constitution which limit the power of the Federal Government and reserve other power to the States are to mean anything, they mean at least that the States have power to pass laws and amend their constitutions without first sending their officials hundreds of miles away to beg federal authorities to approve them. Moreover, it seems to me that [a law] which gives federal officials power to veto state laws they do not like is in direct conflict with the clear command of our Constitution that "The United States shall guarantee to every State in this Union a Republican Form of Government."

(Black, J., concurring in part and dissenting in part) (footnote omitted).

In contrast, Respondents urge this Court to accord *no* deference to the interpretation HCFA has, pursuant to the Administrative Procedures Act, explicitly adopted in formal rules. 42 C.F.R. §§ 442.202, .203 and .206. These rules expressly *prohibit* the States from funding the abortions at issue – in direct contradiction of the "directive." And even though it has been more than two years since the change in the Hyde Amendment, HCFA has not amended these regulations, nor evinced any intention to do so. It is difficult to see how any clear and unambiguous requirement could emerge when the federal agency charged with administering the statute persists in contradicting *itself*.

Finally, the HCFA "directive" adopts the position that States must fund all medically necessary procedures falling into any of the "mandatory coverage" categories. Opp. at 2b. As noted above, the Courts of Appeals are split on this view of Title XIX, and the majority of them reject it. In sum, the "directive" is contradicted by formal published rules, was issued without statutory authority, and is based on a legal theory that has been rejected by most federal appellate courts.[6] Indeed, it must be noted

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[6] Respondents continue to insist that the outcome of this case rests upon the Supremacy Clause. Respondents concede, however, as they must, that Colorado's participation in the Medicaid program is voluntary. Opp. at 10. Accordingly, it is beyond dispute that Congress has not intended to preempt the field in this area, and that the Spending Power, not the Supremacy Clause, is at issue. *See Puerto Rico Dep't of Consumer Affairs v. Isla Oil Corp.*, 485 U.S. 495, 503 (1988) (requiring "clear and manifest purpose" of preemption). Thus, Respondents' argument in this regard begs the question that *Pennhurst* and *Dole* require us to ask: has Congress been clear and unambiguous in its intentions?

that a truly "unambiguous" requirement would require much less effort to establish. The contortions that Respondents are forced to undergo show that this supposed requirement is neither clear nor unambiguous.

3. Closely related to the "clear and unambiguous requirement" doctrine are principles of comity and federalism. This Court has recognized that comity represents:

> [A] system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and future.

Younger v. Harris, 401 U.S. 37, 44-45 (1971). To this end, this Court has emphasized the "scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts." *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 111 (1981) (quoting *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932)). *Accord New York v. United States*, 505 U.S. 144, 175 (1992) (States need not appropriate state funds as "a congressionally compelled subsidy.") This is true even though Colorado has voluntarily opted into the Medicaid program, since "the departure from the constitutional plan

cannot be ratified by the 'consent' of state officials." *Id.* at 177.[7]

In the end, the question presented is unquestionably important and Respondents have expressly conceded that this Court has not addressed it. Although Respondents claim that the requirement to fund these abortions is clear and unambiguous, Respondents and the Courts of Appeals cannot agree on where the requirement is found, nor its scope. The federal agency charged with administering the Medicaid program persists in contradicting itself. Notwithstanding this confusion, the court below found a "clear and unambiguous" requirement, and invalidated a popularly adopted state constitutional provision. Review of this case is strongly warranted.

For the foregoing reasons, the petition for a writ of certiorari should be granted. In the alternative, the petition should be held in abeyance pending disposition of the petitions from Arkansas, Nebraska, Louisiana, and Pennsylvania.

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[7] Even though Colorado has chosen to participate in Medicaid in order to access federal funds, it need not do so. Even assuming, *arguendo*, that federal law requires public funding of abortions, in light of *New York v. United States* and principles of comity, the appropriate remedy is *not* invalidation of a state constitutional provision. At most, the court below should have enjoined the State's participation in Medicaid unless and until state law permits it to do so.

Respectfully submitted this 15th day of November, 1995.

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